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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                   DONALD C. BURCHETT,  
11    Plaintiff,  
12    v.  
13                           TRACY JOHNSON and BRAD DUDLEY,  
14    Defendants.

15    Case No. C05-5514RJB

16    ORDER ADOPTING REPORT  
17    AND RECOMMENDATION

18                         This matter comes before the court on the Report and Recommendation of Magistrate  
19                         Judge J. Kelley Arnold (Dkt. 18). The court has considered the Report and Recommendation and  
20                         the file herein.

21    **I. BACKGROUND**

22                         Plaintiff Donald C. Burchett is an inmate and has filed a civil rights complaint against  
23                         defendants Tracy Johnson and Brad Dudley, counselors at the Washington Corrections Center.  
24                         Dkt. 5 at 4-5. He alleges that the defendants refused to permit him to call legal counsel to consult  
25                         about his three pending federal lawsuits. Dkt. 5 at 5. The court notes that the plaintiff is appearing  
26                         *pro se* in each of the lawsuits to which he refers in his complaint. *See Burchett v. Cook, et al.*,  
27                         2:05-cv-00503-RSL-MJB; *Burchett v. Rhit*, 2:05-cv-00907-TSZ-JPD; *Burchett v. Van Buren, et*  
28                         *al.*, 2:05-cv-00287-JCC-MAT. He further contends that he sent legal documents to the  
                               defendants for copying on July 17 and July 19, 2005, and had not received the documents or  
                               copies as of August 16, 2005. Dkt. 5 at 5. Finally, he contends that the defendants arranged to

1 have him transferred in order to prevent him from working on his lawsuits because Mr. Burchett's  
 2 lawsuits are against the defendants' employer. Dkt. 5 at 5. Mr. Burchett seeks \$200,000 in  
 3 damages and equitable relief. *Id.* at 6. In their answer, the defendants admit that some of Mr.  
 4 Burchett's legal documents and copies were not returned to him by July 24, 2005. Dkt. 11 at 1.  
 5 Mr. Burchett moves for summary judgment on his claims, contending that the defendants' actions  
 6 caused him to be denied a pardon from the Governor. Dkt. 13.

## 7 II. DISCUSSION

### 8 A. SUMMARY JUDGMENT STANDARD

9 Summary judgment is proper only if the pleadings, depositions, answers to interrogatories,  
 10 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as  
 11 to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.  
 12 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails  
 13 to make a sufficient showing on an essential element of a claim in the case on which the  
 14 nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).  
 15 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a  
 16 rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*  
 17 *Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative  
 18 evidence, not simply "some metaphysical doubt."). See also Fed.R.Civ.P. 56(e). Conversely, a  
 19 genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed  
 20 factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v.*  
 21 *Liberty Lobby, Inc.*, 477 S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical*  
 22 *Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

23 The determination of the existence of a material fact is often a close question. The court  
 24 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
 25 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*  
 26 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of  
 27 the nonmoving party only when the facts specifically attested by that party contradict facts  
 28 specifically attested by the moving party. The nonmoving party may not merely state that it will

1 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial  
 2 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
 3 Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be  
 4 "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

5 **B. CIVIL RIGHTS CLAIMS**

6 Mr. Burchett's claims are premised upon the theory that the defendants' actions deprived  
 7 him of access to the courts. Inmates have a fundamental constitutional right of access to the  
 8 courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The right of access is merely the right to bring  
 9 to court a grievance the inmate wishes to present. *Id.* at 354. The Supreme Court has recognized  
 10 two classes of access cases. The first concerns actions that are presently frustrating the plaintiff's  
 11 attempts to access the court and pursue a claim. *Christopher v. Harbury*, 536 U.S. 403, 413  
 12 (2002). Such cases are aimed at placing the plaintiff in a position to pursue a separate claim for  
 13 relief once the frustrating element is remedied.

14 The second category concerns actions that previously frustrated a litigant's efforts at  
 15 accessing the courts in such a way that the suit can no longer be properly litigated. *Id.* at 414.  
 16 Plaintiffs in this category contend that the defendants' actions resulted in the unfavorable  
 17 disposition of a meritorious case. *See id.* The goal of these cases is to provide plaintiffs with relief  
 18 that is unobtainable in future suits. *Id.* Mr. Burchett falls within this second category, claiming  
 19 that he was denied a pardon as a result of the defendants' actions.

20 In either case, "the right [of access to the courts] is ancillary to the underlying claim,  
 21 without which a plaintiff cannot have suffered injury by being shut out of court." *Id.* at 415. This  
 22 underlying claim must be arguable and nonfrivolous. *Lewis*, 518 U.S. at 353 n.3, 343. Mr.  
 23 Burchett has not provided the court with any information concerning his attempt to seek a pardon  
 24 from the Governor or the basis for its denial. The court cannot conclude as a matter of law  
 25 whether this underlying claim was arguable and nonfrivolous. The court should therefore adopt  
 26 the Report and Recommendation and deny the plaintiff's motion for summary judgment.

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### III. ORDER

Therefore, it is hereby

**ORDERED** that the Report and Recommendation of Magistrate Judge J. Kelley Arnold

4 (Dkt. 18) is **ADOPTED**, and the Plaintiff's Motion for Summary Judgment (Dkt. 13) is

5 | DENIED.

6 The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of  
7 record and to any party appearing *pro se* at said party's last known address.

DATED this 27<sup>th</sup> day of January, 2006.

Robert J. Bryan  
Robert J. Bryan  
United States District Judge